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State v. Woods: Interspousal Burglary in Louisiana - Too Many Doors Left Open?

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State v. Woods: Interspousal Burglary in Louisiana—Too Many Doors Left Open?

I. INTRODUCTION

Defendant, charged with aggravated burglary of the apartment where his estranged wife and three sons resided, was convicted of simple burglary. He entered the apartment at about 4:30 a.m., climbed the stairs to the wife's bedroom, and kicked in the door. Inside were the wife and a male companion, both of whom testified that defendant entered bearing knives and making threats. Defendant argued his entry was authorized because he had a right to enter the community apartment and because his son had given him a key to the apartment. The Louisiana Fourth Circuit Court of Appeal affirmed the conviction and held the husband's entry of the apartment was unauthorized because it was not a community dwelling, and the husband, therefore, had no proprietary interest in it.[1]

II. BACKGROUND

A. Burglary Legislation

Louisiana Revised Statutes 14:62 defines simple burglary as "the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, with the intent to commit a felony or any theft therein. . . ."[2]

Burglary, at common law, was viewed as an offense against the security of habitation. Intrusions into the habitation were thought to create situations especially dangerous to occupants of the habitation. Thus, burglary laws developed out of a desire to prevent danger to human life.[3] The reporter's comments to Louisiana's aggravated burglary article indicate that the Louisiana provisions are based on this same rationale. The explanation for including buildings, vessels, and movables as well as

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1. State v. Woods, 526 So. 2d 443 (La. App. 4th Cir. 1988).
2. La. R.S. 14:62 (1990).
3. C. Torcia, Wharton's Criminal Law § 326, at 186-88 (14th ed. 1980).

dwellings within the scope of the crime is that "there may also be great danger to human life in the burglarizing" of these types of things.[4]

Louisiana jurisprudence also recognizes that human safety is the primary concern behind burglary provisions. In *State v. Lozier*,[5] the Louisiana Supreme Court faced the question of whether entry by misrepresentation constituted an "unauthorized" entry. Before reaching the conclusion that defendant's entry by impersonating a policeman was "unauthorized," the court in dictum stated that "[b]urglary laws are not designed primarily to protect the inhabitant from unlawful trespass and/or the intended crime, but to forestall the germination of a situation dangerous to the personal safety of the occupants."[6] Justice Calogero, writing for the *Lozier* court, emphasized the paramount role that the "unauthorized" element of burglary plays in guarding against danger to human safety: "[a] violent scenario is far less likely to unfold" where the intruder, although possessing the required felonious intent, "is known to the occupant and has expressed or implied consent to be on the premises."[7] The court reasoned that such

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4. La. R.S. 14:60 reporter's comment (1990). Simple burglary is a lesser included offense of aggravated burglary. Thus, where their elements correspond, the considerations behind them are usually also identical. However, in State v. Pierre, 320 So. 2d 185 (La. 1975), the Louisiana Supreme Court found that while Louisiana's definition of aggravated burglary (the unauthorized entering of "any inhabited dwelling or of any structure . . . where a person is present") falls to some extent within the historical and common law concept of burglary as a law designed for the protection of the habitation, the protection that the simple burglary statute provides is much broader.

In *Pierre*, the defendant was convicted of simple burglary for taking the battery out of an automobile. Facing the issue of whether simple burglary required that the entry be into a part of the vehicle where a person could be found, the court stated:

> It was, then, clearly the purpose of the legislature to define simple burglary to include unauthorized entries with intent to commit a theft "other than as set out in Article 60 . . . ."
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> It was undoubtedly the deliberate purpose of the legislature in enacting Article 62 to broaden the definition . . . to include lesser offenses where the felonious entry did not involve entry into an "inhabited" enclosure or one "where a person is present."
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> We think it is clear, therefore, that the historical background which resulted in the common-law definition of burglary is inappropriate to the interpretation of Article 62. Article 62 does not require that the entry be into a part of the vehicle capable of or designed to accommodate a person.

Pierre, 320 So. 2d at 187-88.

Nevertheless, it appears that this language in *Pierre* is limited to situations in which the burglary involves a place where a person could not be found—a place outside the historic coverage of burglary law. In cases where the situation falls within the historic coverage of burglary law, however, presumably the traditional concerns behind burglary provisions apply equally to both Louisiana aggravated and simple burglary provisions.

5. 375 So. 2d 1333 (La. 1979).

6. Id. at 1337.

7. Id.

an entry does not in itself provoke a defensive reaction from the occupant or owner, thus creating a potentially violent situation. The court stated that, likewise, in a situation where the victim actually discovers the intended crime, the discovery is less likely to precipitate violence where the entry was not "unauthorized."[8]

The Model Penal Code provides that a person is guilty of burglary "if he enters a building or occupied structure . . . with [the] purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter."[9] While some jurisdictions track the emphasized language of the Model Penal Code almost exactly in their burglary provisions, others retain the traditional common law requirement that the place entered be that "of another." Still other jurisdictions require that the entry be "unlawful" or made "without consent." Burglary provisions similar or identical to the Model Penal Code, as well as provisions employing "of another," "unlawful," "without consent," or similar language, serve the same practical function as Louisiana's requirement that the entry be "unauthorized." Thus, cases interpreting statutes of other jurisdictions often prove helpful in filling gaps in Louisiana jurisprudence.

B. Jurisprudential Interpretation of the "Unauthorized" Entry Requirement

1. "Unauthorized" Entry as a Distinct Element

Louisiana's jurisprudence has diverged from some jurisdictions[10] by determining that Louisiana's "unauthorized" requirement is an element separate and distinct from the intent requirement. According to the Louisiana Supreme Court in *State v. Dunn*[11] and *State v. Lockhart*:[12]

> [T]he entry must be unauthorized and this must be determined as a distinct element of the offense separate and apart from the intent to steal. If the legislature desired that burglary consist of only an entry with intent to steal, they would have omitted the word *unauthorized*.[13]

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8. Id.
9. Model Penal Code § 221.1 (Official Draft and Revised Comments 1980).
10. Those that hold that ill-intent alone is enough to make an entry unauthorized. See e.g., People v. Gauze, 15 Cal.3d 709, 542 P.2d 1365, 125 Cal. Rptr. 773 (1975).
11. 263 La. 58, 267 So. 2d 193 (1972).
12. 438 So. 2d 1089 (La. 1983).
13. Id. at 1090 (quoting *Dunn*, 263 La. at 63, 267 So. 2d at 195).

2. Emphasis on Occupancy or Possession

Because of the common law requirement that the premises invaded be those "of another," the "owner" could not be found guilty of burglary.[14] However, occupancy or possession, and not title, controlled the question of whether the premises were those "of another," because it was the right of habitation rather than the ownership of the property that was being protected.[15]

This historical emphasis on occupancy or possession continues to prevail in interpretations of modern burglary statutes. In *State v. Harold*,[16] for example, the North Carolina Supreme Court faced the question of whether a defendant's alleged ownership interest in the house where his victim resided prevented the house from being considered that "of another" as to the defendant. The court held that the defendant's ownership interest in the house was not controlling and stated that defendant's emphasis on ownership was misplaced, the reason for prohibiting burglary being "to protect the habitation . . . from meditated harm."[17] The court further provided that occupation or possession of a dwelling is equivalent to ownership in burglary cases and that actual ownership need not be proved. Likewise, in *Adirim v. State*,[18] holding that naming the person responsible for custody of the property as owner in the bill of information rather than the actual owner did not constitute reversible error, a Florida district court of appeal stated that "[b]urglary is not a disturbance to the fee of the place as realty, but to the habitable security. Therefore, in burglary, ownership means any possession which is rightful as against the burglar."[19]

Innumerable courts, including the Louisiana Supreme Court in *State v. Simmons*,[20] have stated that the test for determining in whom ownership of the premises should be laid is not title, but occupancy or possession at the time of the offense. In *Simmons*, the court held that the bill of information was not fatally defective even though the individual designated as owner of the building was the tenant of the room broken into rather than owner of the building. Other courts, while still de-emphasizing actual ownership, phrase the test for ownership in terms of "control" or "management." In *Gilbreath v. State*,[21] for example, a Texas court of criminal appeals stated that in burglary cases the law deems the person having

14. W. Lafave and A. Scott, Criminal Law, § 8.13(c), at 797 (2d ed. 1986).
15. Id.
16. 312 N.C. 787, 791-92, 325 S.E.2d 219, 222 (1985).
17. Id. at 791.
18. 350 So. 2d 1082 (Fla. Dist. Ct. App. 3d Cir. 1977).
19. Id. at 1084.
20. 249 La. 647, 190 So. 2d 83 (1966).
21. 158 Tex. Crim. 616, 259 S.W.2d 223 (Crim. App. 1953).

the "care, control, and management" of the premises at the time of the offense to be the owner and that ownership may be alleged in that person.

Although, traditionally, the emphasis on occupancy or possession has arisen primarily in either lessee-as-victim or employee-as-victim contexts, recent extensions of this same rationale to a marital context have resulted in the courts holding that an estranged spouse can commit burglary of a dwelling in which he has an ownership interest, and in some cases, even of the family home in which he no longer lives.[22]

In *Parham v. State*,[23] a husband who had been convicted by a jury of burglarizing the dwelling that he had once shared with his wife contended that under Maryland family law, the dwelling should have been considered marital property because it was acquired during the marriage. Thus, he contended that he could not be convicted of burglary because the dwelling was his own, and not that "of another."[24] The court rejected his contentions, stating that the law of burglary was "designed for the purpose of protecting the habitation . . . and thus, occupancy or possession, rather than ownership, is the test."[25] Concluding that a rational trier of fact could have found that the husband had neither a possessory interest in the dwelling nor a right to be there at the time of entry, the court sustained the husband's conviction.[26]

Again, in *State v. Schneider*,[27] the defendant spouse focused on actual ownership of the premises. The wife in *Schneider* contended that under Washington community property law, in order to prove that she entered "unlawfully," the State had to prove that her husband owned the house and that she did not, thus rebutting "the strong presumption that the house was community property."[28] The Washington appeals court responded, stating that Mrs. Schneider's contentions misconstrued the nature of burglary. Because the purpose of burglary law is to protect the dweller, occupancy rather than ownership controls.[29] The *Schneider* court ultimately affirmed Mrs. Schneider's burglary conviction.[30]

In some decisions, either the statutory embodiment of the emphasis on occupancy or possession or the previous grant of some form of injunctive relief to one of the spouses has facilitated the court's decision

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22. W. Lafave and A. Scott, Criminal Law, § 8.13(c), at 797 n.61 (2d ed. 1986).
23. 79 Md. App. 152, 556 A.2d 280 (Ct. Spec. App. 1989).
24. Id. at 161 n.2, 556 A.2d at 284 n.2.
25. Id. at 161, 556 A.2d at 284.
26. Id. at 163, 556 A.2d at 285 (The court noted that its holding was consistent with Maryland theft law, which provided that it is a defense to theft that the property involved was that of defendant's spouse, unless defendant and defendant's spouse were not living together as man and wife and were living in separate abodes at the time of the theft.)
27. 36 Wash. App. 237, 673 P.2d 200 (Ct. App. 1983).
28. Id. at 240, 673 P.2d at 203.
29. Id. at 241, 673 P.2d at 203.
30. Id. at 244, 673 P.2d at 205.

as to whether an entry was of a prohibited nature. Under the Texas statutory scheme, "owner" is defined as one who has "title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor," as noted by the Texas court in *Ex Parte Davis*.[31] The wife in *Davis* had been granted the exclusive right of possession of the residence by court order and the defendant husband had been ordered to stay away. The court found that the husband's entry was without the effective consent of the "owner," even though title to the residence was held by the defendant husband and his brother. In applying the Texas statutory provision to the facts before it, the court stated that the injunction did even more than give the wife a "greater right to possession"; it gave her exclusive possession of the residence and negated all rights to enter held by the husband.[32]

Although the existence of the injunctive relief in *Davis* certainly made the court's decision more clear-cut, failure to secure such relief even though it is available or failure to notify defendant as to its imposition will not necessarily be dispositive in a burglary case. In *Stanley v. State*,[33] the Texas court of criminal appeals again dealt with a husband who was charged with burglary of his wife's home. Husband and wife separated, and the wife obtained a temporary injunction which, among other things, prohibited her husband from interfering with her use and possession of the home they had previously shared. Apparently, however, no notice of the injunction was served on the husband.[34] The wife subsequently moved to a different residence, which her husband broke into. Defendant cited the *Davis* court's emphasis on the fact that the injunction had given the wife a greater right to possession. He argued that because he had not been notified of the temporary injunction and because of the marital relationship, he was entitled to enter.[35]

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31. 542 S.W.2d 192 (Tex. Crim. App. 1976).

32. Id. at 196. See also Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1985) (defendant was not entitled to directed verdict on burglary charge on ground that house he allegedly burglarized was first rented as abode for him and his estranged wife, that he had occupied it with her during their marriage, and that he therefore had legal right to be on premises, where house in question was owned by brother of estranged wife, who was murder victim, and rented to wife to be used as marital abode when parties were not separated, and defendant was under court order to stay away from premises); State v. Kilponen, 47 Wash. App. 912, 737 P.2d 1024 (Ct. App. 1987) (defendant could not change court's order that defendant not approach or communicate with his wife directly or indirectly or go to family residence for any purpose unless accompanied by deputy sheriff, so that interlineation in acknowledgment of defendant's understanding of order stating that defendant agreed to conditions until arraignment on specific date was without effect and order had not expired when defendant entered wife's home, for purpose of establishing unlawful entry element of burglary).

33. 631 S.W.2d 751 (Tex. Crim. App. 1982).

34. Id. at 752.

35. Id. at 753.

The court rejected defendant's claim that the marital relationship authorized him to enter, without considering the "effect of the temporary injunction, of which appellant had not been notified."[36] In determining that the wife clearly had the greater right to possession and was an "owner" under the Texas statute, the court focused on the fact that the couple in question had separated, the wife had filed for divorce, had moved from the home where she had formerly resided with her husband, and had established another home for herself and her son. Based on these circumstances, the court concluded, "[s]he had the right to refuse to consent. There was no implied consent to break and enter merely because of the marital status."[37] Thus, although injunctive relief had been obtained by the wife, the court decided the case on other grounds, showing that failure to obtain such relief when it is available may not be fatal to the burglary charge.

In *State v. Herrin*,[38] the defendant husband admitted that his entry constituted a possible violation of a court order restricting him from the property but contended that, because he and his wife were equal owners of the house, he could not be a burglar with respect to that house. The court looked to Ohio trespass law and found it significant that in that state a person can trespass and therefore commit burglary against property of which he is legal owner.[39] The Ohio trespass statute provided that "land or premises of another" included any place "belonging to, controlled by, or in the custody of another."[40] The court ultimately found that the house was in the custody of and controlled by defendant's wife, not by defendant who was living elsewhere at the time.[41] Thus, when defendant entered without wife's permission, he "trespassed" and, because the other elements were also present, committed burglary.[42]

3. Consent

The Louisiana Supreme Court in *Lozier* explained the nature of consent as a traditional defense against burglary. In *Lozier*, defendant was charged with two counts of aggravated burglary. In addition to the entry by misrepresentation charge presented earlier in this note, defendant was also charged with having entered another apartment after an accomplice locked the occupant in his bathroom, then admitted the defendant.

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36. Id.
37. Id.
38. 6 Ohio App. 3d 68, 453 N.E.2d 1104 (Ct. App. 1982).
39. The Ohio burglary statute provided: "No person, by force, stealth, or deception, shall trespass in an occupied structure . . . with purpose to commit therein any theft offense . . . or any felony." Id. at 69, 453 N.E.2d at 1106.
40. Id.
41. Id.
42. Id.

The court found that the accomplice, whom the occupant had never met before but invited inside, did not have the right to authorize defendant's entry; nor, the court found, was defendant's entry authorized, when he misrepresented himself as a police officer and entered with the apparent consent of occupant, that consent being based solely on the understanding that defendant was a police officer.[43] Before reaching its conclusions, however, the court explained the general requirements for valid consent. Focusing specifically on the case of a private dwelling, the court provided that in order to constitute a defense to an "unauthorized" entry, the consent given must be that of an occupant or an occupant's agent. Furthermore, it must be given by one who possesses both the authority and the capacity to consent. Finally, in dictum, the court stressed,

> The consent must be voluntary and intelligent, that is, based on a reasonable understanding of the identity and purpose of the intruder. . . . Obviously, a child who admits a total stranger would not necessarily have sufficient understanding of the circumstances of the entry to give valid consent to an entry.[44]

Applying the principles laid out in *Lozier* to a situation where the victim's ten-year-old daughter let the defendant enter the house, the Louisiana First Circuit Court of Appeal stated in *State v. Tuggle*:[45] "Even assuming that the defendant entered the house with the daughter's consent, a ten-year-old girl lacked the authority and capacity to give such consent." The Texas court in *Davis*, in which the defendant contended that a twelve-year-old girl allowed him to enter the house, likewise stated that "[e]ven if she voluntarily admitted appellant, there is nothing in the record to suggest that such act by the twelve-year-old girl was *effective* consent. . . ."[46]

In situations where a minor son or daughter intentionally allows a defendant entry into his or her parents' home in order that the defendant may steal, some courts have stressed the *unlawful* nature of the purpose in holding that minors have no such authority to consent. For instance, in *People v. Martin*,[47] while recognizing that a minor living in a house rented and controlled by his father "may have the ability to authorize entries into his parents' house for lawful purposes,"[48] the court held that he may not authorize the defendant's entry into the house for "the

43. State v. Lozier, 375 So. 2d 1333, 1337 (La. 1979).
44. Id. at 1336.
45. 504 So. 2d 1016, 1020 (La. App. 1st Cir. 1987).
46. Ex Parte Davis, 542 S.W.2d 192, 196 (Tex. Crim. App. 1976).
47. 115 Ill. App. 3d 103, 106, 449 N.E.2d 1039, 1041 (Ct. App. 1983).
48. Id.

unlawful purpose of stealing his parents' jewelry."[49] The distinction recognized in these cases between consent for a lawful purpose and consent for an unlawful purpose in determining whether the entry was authorized, however, would probably be invalid in Louisiana. In light of decisions like *Dunn* and *Lockhart*, which state that an entry is not unauthorized simply because the defendant intends to commit a felony or theft therein (the intent and the unauthorized entry constituting distinct elements under the Louisiana statutory scheme), the rationale of *Martin* would probably be rejected by Louisiana courts.

C. *Guidance From Other Areas of Law*

1. Interspousal Theft

Because at common law husband and wife were considered one person, neither husband nor wife could be guilty of larceny for taking the other's property.[50] With the passage of the Married Women's Property Acts, which treat women as individuals independent of their husbands in property matters, and other statutes, this complete interspousal immunity no longer stands in most states.[51] Indeed, as early as 1910, although the marriage in question was doubtful, the Louisiana Supreme Court in *State v. Hogg*[52] held that a "husband" could be guilty of embezzling his "wife's" property.[53]

The Model Penal Code contains a specific provision regarding interspousal theft which abolishes interspousal immunity except in certain narrowly defined circumstances:

> (4) *Theft From Spouse.* It is no defense that theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.[54]

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49. Id. See also K.P.M. v. State, 446 So. 2d 723 (Fla. Ct. App. 1984) (where son of owners of home invited defendant to enter home and steal items, invitation did not provide defendant with affirmative defense of consent to charge of burglary, since consent of son was unauthorized and inoperative, and defendant could not reasonably, and in good faith, have believed that the son had the authority to permit him to enter residence for purpose of stealing).

50. C. Torcia, Wharton's Criminal Law § 393, at 390 (14th ed. 1980).

51. Model Penal Code and Commentaries § 223.1 comment 5 (Official Draft and Revised Comments 1980).

52. 126 La. 1053, 53 So. 225 (1910).

53. The court reserved the question of whether a wife could be guilty of embezzling her husband's property.

54. Model Penal Code and Commentaries § 223.1(4) (Official Draft and Revised Comments 1980).

Thus, the availability of this "household and personal effects" defense hinges on whether the parties still live together.

2. *Interspousal Rape*

The Louisiana legislature has specifically addressed the possibility of rape between persons still legally married and has determined that, except in the case of simple rape, the fact that the person charged with the rape was still legally married to the victim at the time of the act warrants no exceptional treatment under the law. In the 1990 session, the Louisiana legislature amended Louisiana Revised Statutes 14:41, which defined rape as "the act of . . . sexual intercourse with [someone] who is not the spouse of the offender, committed without . . . lawful consent."[55] The article further provided that a person is not considered a "spouse" if either: (1) a judgment of separation has been rendered; or (2) if the spouses are not legally separated but are living separate and apart, and the offender knows that a temporary restraining order, preliminary or permanent injunction, or other order has been issued prohibiting the offender from sexually or physically abusing, intimidating, threatening violence against, or in any way physically interfering with the other spouse.[56] Under the new law, it is irrelevant that the spouses are still legally married for most rape crimes. In the case of simple rape,[57] however,

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55. La. R.S. 14:41(A) (amended 1990).
56. Id. 14:41(C) (repealed 1990).
57. La. R.S. 14:43 provides:

> A. Simple rape is a rape committed where the anal or vaginal sexual intercourse is deemed without the lawful consent of the victim who is not the spouse of the offender because it is committed under any one or more of the following circumstances:
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> (1) Where the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when the victim has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity; or
>
> (2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity; or
>
> (3) Where the female victim submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretence, or concealment practiced by the offender.
>
> B. For purposes of this Section, a person shall not be considered to be a spouse if a judgment of separation from bed and board has been rendered, or if the person and the offender are not legally separated but

the possibility of a husband or wife being found guilty of interspousal rape still depends upon whether some form of available judicial relief has been obtained by the alleged victim, and in the absence of a legal separation, also upon whether the couple no longer lives together.

III. ANALYSIS

A. Structure of the Court's Analysis

The *Woods* court framed the issues in the case as: (1) whether the apartment was a community dwelling;[58] and (2) if so, whether Woods' entry into the apartment could be considered unauthorized. After answering the community dwelling inquiry in the negative, the court stated that the entry was unauthorized. The court did not expressly address the second question.

The court's overall approach to the "unauthorized" inquiry appears to have been as follows: to determine whether the dwelling is a community one, the court looks to the classification of the rent obligation under the Louisiana Civil Code's matrimonial regimes articles. If the rent obligation is a separate obligation, then the husband has no proprietary interest in the dwelling. If, however, it is a community obligation, he does have a proprietary interest.

Thus, the initial question asked by the *Woods* court, on a more basic level, is whether the defendant has any proprietary interest in the premises. If not, then the defendant's entry is unauthorized, and the inquiry ends here with the same outcome as *Woods*. If, however, defendant does have a proprietary interest in the premises, then apparently the *Woods* court would say that the entry is not unauthorized.[59] Such a theoretical frame-

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> are living separate and apart and the offender knows that a temporary restraining order, preliminary or permanent injunction, or other order or decree has been issued prohibiting or restraining the offender from sexually or physically abusing, intimidating, threatening violence against, or in any way physically interfering with the person.
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> C. Whoever commits the crime of simple rape shall be imprisoned, with or without hard labor, for not more than twenty-five years.

58. Apparently, what the court means by "community dwelling" is whether the dwelling may be considered "of the community" or "community property."

59. This conclusion may be reached by considering the implications of the court's statement: "Therefore, the appellant *does not have any proprietary interest* in the apartment, *and as such*, his entry *could be* deemed to have been an *unauthorized* entry." (emphasis added). State v. Woods, 526 So. 2d 443, 445 (1988). This statement suggests that where the defendant *does have* proprietary interest in the premises, then his entry *could not* be deemed unauthorized.

work, where proprietary interest is apparently determinative of whether an entry is unauthorized, is virtually impossible to reconcile with burglary policy and jurisprudence. As illustrated by the doctrine and jurisprudence reported in this note, the focus of burglary law has been primarily on protection of occupancy or possession of property, and not on protection of ownership. To embrace the *Woods* rationale entirely would lead to the absurd conclusion that a lessor may not be convicted of burglarizing his lessee's home. This is clearly not the law.

As a practical matter, the *Woods* court did consider the occupancy or possession of the premises in its determination that the rent obligation was not a community obligation. The court stated that the rental of the apartment for the sole use of Mrs. Woods and her children did not meet the criteria of a community obligation, "especially where . . . [Mr.] Woods did not also live there."[60] However, the court's failure to include occupancy or possession as a consideration in its overall analysis, and its emphasis on proprietary interest instead, certainly cast doubt on the soundness of the theory behind the decision—especially because the court is wrong in its analysis of the community right involved as well.

Also questionable about the *Woods* approach is its failure to address consent as a possible defense, the court basically "punting" the issue. As stated in *Lozier*, consent is a traditional defense against burglary, but to be valid, it must conform to certain requirements: the consent given must be that of an occupant or an occupant's agent; it must be given by one with the authority and capacity to consent; and it must be voluntary and intelligent.

Applying these requirements to the facts in *Woods*, in which George Woods and his son who lived in the apartment both gave uncontroverted testimony that the son had provided Woods with a key to the apartment, it appears that Woods had the consent of an "occupant." Mrs. Woods, however, testified that she had changed the locks to the apartment three times to prevent Mr. Woods from entering the apartment with the keys given to him by the sons. Thus, the questions of whether the son had the authority and capacity to consent, and whether the consent was voluntary and intelligent remain.

After stating that "voluntary and intelligent" consent requires that the consent be based on a reasonable understanding of the identity and purpose of the intruder, the *Lozier* court stated that a child who allows a total stranger to enter would not necessarily have sufficient understanding of the circumstances to give valid consent. *Woods* is certainly distinguishable from such a scenario in that the child in *Woods* knew the identity of George Woods, his father. In addition, Woods testified that he had explained to his sons that he was interested in reconciling with

60. *Woods*, 526 So. 2d at 445.

his wife. Furthermore, Woods stated that the sons shared this interest and appeared to suggest that this was part of the son's motivation in giving his father the key. Is this enough to say that the son's giving the key to his father was based on a reasonable understanding of the father's purpose?

Finally, addressing the authority and capacity requirement, the first circuit in *Tuggle* stated that a ten-year-old girl lacks the authority and capacity to consent. The *Woods* record does not provide the age of the son who gave Mr. Woods the key. Based on the clarity of his testimony at trial and on the fact that he was given his own key to the apartment to let himself in after school, the child probably was not of tender years. But even if the son were found to be of a sufficient age to give effective consent, what effect if any should his mother's changing the locks have on his authority to consent? The question of consent appears to have been at least worthy of the court's consideration.

B. Classification of Rent Obligation

Again questionable, but perhaps flowing from an attempt by the court to achieve an equitable result within the context of its faulty overall analytical framework, is the court's classification of the rent obligation as a separate one. Although the classification of the obligation would be irrelevant if the court had properly focused on occupancy or possession rather than on proprietary interest in its overall burglary analysis, this portion of the opinion is being addressed only to point out its potentially dangerous implications for matrimonial regimes law.

First, the court not only ignored the presumption of Civil Code Article 2361 that any obligation incurred during the existence of the community property regime is presumed to be a community obligation, but entirely reversed it. The court said, "it does not appear that the rental . . . of the apartment . . . would meet the criteria of a community obligation . . . . As such, Ms. Woods' rent obligation would be her separate obligation, not an obligation of the community. . . ."[61] Thus, the court appeared to place the burden of proof on the party in whose favor the presumption normally applies, and not on the party asserting that the obligation was a separate one, who normally bears the burden of rebuttal.

It appears that the obligation ultimately should have been classified as a community obligation. Applying the presumption of Article 2361, unless the rent obligation meets the criteria of a separate obligation under Article 2363, it is a community obligation. Article 2363 provides, in relevant part, that a separate obligation is one incurred "during the existence of a community property regime though not for the common

61. Id.

interest of the spouses or for the interest of the other spouse."[62] One can hardly say that an obligation incurred by a wife for the purpose of providing shelter for her and her husband's children would be one "not for the common interest of the spouses" or one not "for the interest of the [husband]."

IV. Questions Left Open by the *Woods* Court

After *Woods*, many questions remain unanswered regarding interspousal burglary in Louisiana. Among the issues that the court failed to address are: (1) the relevant policy considerations in the area of interspousal crimes; and (2) the role that should be assigned to the various forms of relief available to the spouses.

Any discussion of interspousal crimes would be incomplete without a presentation of certain basic policy concerns. Various theories of legislation have been advanced by different jurisdictions in the areas of interspousal and interfamily theft law,[63] some of which are equally relevant to interspousal burglary. One such theory is that prosecution in this area undermines the unity of the family. However, the counter-argument to this theory is that the theft itself and the desire of one spouse to prosecute the other evidence the fact that family unity has already been disrupted. Furthermore, disruption of the family unit is even more evident in interspousal burglary cases in which the spouses have chosen to discontinue living together.

Another theory is that prosecution of interspousal crimes should be restricted because of the danger of miscarriage of justice, interspousal bitterness making testimony especially unreliable. This argument belittles the effectiveness of our criminal justice system, which is designed to determine the truth or falsity of accusations.[64] The possibility of false accusations exists in all areas of criminal law and, even though our system may fail to screen invalid accusations in some cases, there is no reason to believe that it will do so to a significantly greater degree in the interspousal crime area.[65] As stated by commentators addressing similar concerns in the interspousal rape area, "[i]f potential false charges were reason not to legislate against certain actions, there wouldn't be a law on the books."[66]

A third theory is that family thefts should be excluded from criminal law because they are so generally tolerated that the actor cannot be

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62. La. Civ. Code art. 2363.

63. Model Penal Code and Commentaries § 223.1 comment 5 (Official Draft and Revised Comments 1980).

64. Comment, The Marital Rape Exemption, 27 Loy. L. Rev. 597, 600 (1981).

65. Id.

66. Id. (quoting Griffin, In 44 States It's Legal to Rape Your Wife, 9 Student Law. 20, 21 (1980)).

considered as "deviating significantly from social norms."[67] There is some feeling also that the possibility of some misappropriations by a spouse is part of the risk assumed by matrimony. These arguments are less persuasive in the typical interspousal burglary case. In most interspousal burglary situations, the spouses no longer live together, and each spouse legitimately expects a certain degree of privacy. Furthermore, the potentially dangerous situation created by the unexpected and unauthorized invasion by one spouse into the abode of the other is exactly the type of situation burglary law was designed to guard against and cannot be justified by the fact that such dangers are often tolerated and go unreported. By analogy, interspousal battery is also often tolerated. Yet interspousal battery is still considered a crime. The same should be true for interspousal burglary when the spouses no longer live together.

Lastly, there is the belief that family crime complaints are but a symptom of family quarrels, which criminal courts are unsuited to handle. Again, the significance of this argument is weakened in the marital burglary context. The facts that the spouses have resorted to separate residences and that one spouse desires that the other not enter his or her dwelling without permission indicate that the problems between the spouses have escalated beyond a mere "family quarrel" into something so much more serious that the family unit is in jeopardy. Unauthorized intrusions under such circumstances create dangerous situations for which criminal law is indeed the proper remedy and criminal court is the proper forum.

It is also important to explore the possible role of various forms of relief available to Louisiana spouses who suffer marital difficulties. Louisiana spouses have several remedies available to them including, of course, filing for separation or divorce. Also available are the remedies of Louisiana Revised Statutes 9:306,[68] which provides for an injunction to prohibit a spouse from physically or sexually abusing the petitioning spouse, and Louisiana Revised Statutes 9:308,[69] which provides for the use and occupancy of the family home. The protection of each of the latter two statutes, however, is available only when one of the spouses has filed for separation or divorce.[70] What should be the role of these possible forms of relief in Louisiana burglary law? Should a spouse be required to pursue separation or divorce as well as one of these remedies before Louisiana extends the protection of its burglary provisions? Or is it more desirable to provide interim protection to spouses for that period after

67. Model Penal Code and Commentaries § 223.1 comment 5 (Official Draft and Revised Comments 1980).

68. La. R.S. 9:306 (1990).

69. La. R.S. 9:308 (1990).

70. Relief under 9:306 is available only *after* petition for separation or divorce has been filed, but relief under 9:308 may be filed for *in conjunction with* the filing for separation or divorce.

the spouses have ceased living together but before either has filed for separation or divorce?

The Louisiana legislature, as presented earlier in this note, has specifically addressed the possibility of interspousal rape and has placed extreme significance on whether the victim spouse has obtained an available remedy and whether the spouses live separate and apart in the case of simple rape, but has chosen to give spouses no special treatment under the other rape provisions. Although Louisiana has no specific interspousal theft provision, the Model Penal Code provision places emphasis merely on whether the parties still live together, and not on whether available relief has been secured, in determining the availability of the "personal effects defense." What approach should be chosen for Louisiana burglary law?

In light of the relevant policy considerations, the historic emphasis of burglary law on occupancy or possession, and the practical need in many instances for protection for spouses prior to filing for separation or divorce, it appears that the most sensible approach to interspousal burglary would be to look to who actually resides at the premises in determining whether an entry is authorized. Only the actual occupants and those authorized to enter by an occupant or an occupant's agent should be considered authorized under the law. Although filing for legal separation or divorce and obtaining some form of legal protection would make it clearer to a spouse that he or she is no longer authorized to enter the premises where the other spouse resides, problems may arise prior to filing for legal separation or divorce and obtaining legal protection. Pursuit of relief, as a practical matter, may often be either delayed or not attempted at all by spouses; yet problems may occur nevertheless. When a person has chosen to cease living with his or her spouse, mere failure to have already taken legal preventive measures should not be enough to deny that person burglary law protection.

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